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CITATIONS

530824—43——1

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. —

UNITED STATES, PETITIONER

v.

ALGERNON BLAIR, INDIVIDUALLY, AND TO THE USE OF ROANOKE MARBLE & GRANITE COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above case on October 5, 1942.

OPINION BELOW

The opinion of the Court of Claims is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on October 5, 1942. A motion for a new trial was overruled on March 1, 1943. The jurisdiction of this Court is invoked under the pro-

visions of Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTIONS PRESENTED

1. Under the standard form of Government building contract, respondent (the general contractor) and a plumbing, heating, and electrical contractor were each given 420 days to complete performance of their respective portions of a construction project. As a result of the failure of the latter contractor to carry out his part of the job satisfactorily, his contract was terminated and his work completed by another contractor. Both respondent and the new plumbing, heating, and electrical contractor completed performance of their contracts within the specified 420 days, but respondent would have finished 106 days sooner if the Government had earlier superseded the original plumbing, heating, and electrical contract. The question is whether the Government is liable to respondent for damages resulting from this 106 days' delay.

2. Articles 3 and 5 of the standard form contract provide that no extra pay for changes or extra work shall be allowed unless there has been a written order therefor by the contracting officer or, when the change involves over $500.00, by the head of the department or his authorized representative. The question is whether respondent can recover the excess cost of labor and materials furnished for work not required under the contract when no such written order was received.

3. Article 15 of the standard form contract provides that disputes concerning questions arising under the contract shall be decided by the contracting officer, subject to written appeal by the contractor to the head of the Department, whose decision shall be final. The question is whether respondent may recover damages found to have resulted from the arbitrary and capricious acts and instructions of the Government inspectors at the site of the work, either where no ruling thereon was obtained from the contracting officer, or where no appeal was taken from the ruling of the contracting officer to the head of the department.[1]

CONTRACT PROVISIONS INVOLVED

The provisions of the Government contract here involved are set out in the Appendix, pp. 28–32, *infra*.

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[1] Should a writ of certiorari be granted, the Government reserves the right to submit argument on the following additional questions: (4) Assuming that damages for delay caused by the Government are recoverable, whether general office overhead may be included as an item of such damage; (5) Whether the claim of a subcontractor of respondent for excess cost or damages alleged to be caused by acts of the Government is recoverable in a suit by the contractor, in the absence of a finding that the contractor legally was obligated to pay the subcontractor for such damages; and (6) Whether there is a lack of substantial evidence to support the findings of fact by the Court of Claims that the Government's officers and representatives acted unreasonably, arbitrarily, and capriciously in ordering changes and extra work.

STATEMENT

Respondent, Algernon Blair, pursuant to a bid, entered into a contract to construct certain buildings at the Veterans' Administration Facility, Roanoke, Virginia, for a total consideration of $1,228,423.68 (F. 3, pp. 4–5).[2] Both the bid and the contract stated that "performance will begin within ten (10) calendar days after date of notice to proceed and will be completed within four hundred and twenty (420) calendar days after date of receipt of notice to proceed". Notice to proceed was received by respondent on December 21, 1933, thereby fixing February 14, 1935, as the date for completion of all the work called for by the contract (F. 4, p. 7). Concurrently, pursuant to a bid, C. J. Redmon, trading as Redmon Heating Company, entered into a contract (hereinafter referred to as the "mechanical contract") for the performance of all plumbing, heating, and electrical work required or necessary to be installed in the buildings to be constructed by respondent (F. 6, pp. 7–8). Notice to proceed was received by Redmon on or about December 21, 1933 (F. 6, p. 8). Redmon's bid and contract provided that his work was to be commenced promptly after the date of receipt of notice to proceed, and was to be completed at a date not later than that pro-

[2] "F" refers to the special findings of fact made by the Court of Claims, and the page citations refer to the slip-sheet findings and opinion below.

vided in the contract for the general construction which, he was advised, was 420 days (F. 6, p. 8).

Respondent proceeded with the construction of the project and completed it within contract time (pp. 18, 20). Redmon commenced the performance of the mechanical contract but owing to his inability to proceed satisfactorily, it was terminated by petitioner on June 26, 1934 (p. 16). Thereafter the Virginia Engineering Company undertook to complete the mechanical contract on behalf of the surety on Redmon's bond, and all the mechanical work was completed and accepted by February 14, 1935, the contract date (F. 14, p. 18).

Respondent filed a claim with the Veterans' Administration for certain expenses which he contended were caused by the delay of the mechanical contractor and for other items of expense which he alleged were unnecessarily imposed upon him by the arbitrary, capricious, and unfair conduct of the Government's inspectors at the site of the work. After rejection of the claim by the Veterans' Administration, suit was brought in the Court of Claims. That court entered judgment for respondent for $130,911.08 (p. 63). The court's specific findings in respect of each item of claim are substantially as follows:

A. *Delay.*—Respondent planned to complete all the work called for by his contract by November 1, 1934, that is, within 314 calendar days instead of the 420 calendar days allowed by the

contract. On January 24, 1934, respondent advised the mechanical contractor that he hoped to have all buildings completed by November 1, 1934 (F. 9, p. 11). A progress schedule prepared by respondent was furnished to petitioner and to the mechanical contractor on March 30, 1934 (F. 9, p. 10). Respondent commenced work promptly after receipt of notice to proceed, diligently carried it on and at no time was responsible for any delays (F. 5, 6; pp. 7, 8). No representative of Redmon reported at the site of the work until March 19, 1934, when Redmon's superintendent arrived, after many urgent demands from the contracting officer (F. 14, p. 15). The contracting officer, upon protests by respondent that Redmon was delaying the work, wrote to Redmon from time to time urging him diligently to prosecute the work and advising him that the progress of the construction work was being delayed because of his failure properly to proceed (F. 14, p. 15). Redmon did not at any time between the date he was given notice to proceed and June 26, 1934, have adequate equipment or men on the job to carry on properly the work called for by his contract (F. 14, p. 16), and Redmon was not financially able to carry on and complete the work under his contract at any time between the date of the contract and June 26, 1934 (F. 7, p. 9). Reasonable inquiry by petitioner would have disclosed these facts, but no such inquiry was made

due to false statements and reports made to the contracting officer by petitioner's officers and agents in charge of the work at the site (F. 7, p. 9). On June 26, 1934, Redmon advised the contracting officer that he was unable to proceed with his contract, and the Maryland Casualty Company, surety on Redmon's bond, thereupon undertook to carry on some of the work. It made unsatisfactory progress, however, and on July 16, 1934, entered into a contract with the Virginia Engineering Company to take over Redmon's unfinished work (F. 14, p. 16). That company made every effort to overcome the delay which Redmon had caused, with the result that respondent was able to finish performance of the contract by the required date, February 14, 1935 (F. 14, p. 18). Respondent would have completed all of his outside work in early September 1934 had it not been for Redmon's delay; the delay compelled him to do most of the outside work between November 1934 and February 1935 when weather conditions made such work much more expensive (F. 14, p. 17). Respondent also was delayed and put to increased expenses by Redmon's failure to furnish the necessary detail drawings in connection with the boilerhouse equipment and recessed radiators in various buildings (F. 14, p. 17). The court found that respondent was unreasonably delayed for a period of three and one-half months, due to petitioner's failure promptly to terminate Redmon's

contract, that the cost of delay to respondent was $51,249.52,[3] and that petitioner was liable therefor (pp. 20–21).

B. The remaining items for which recovery was allowed must be considered in the light of Articles 3, 5, and 15 of the contract. Article 3 (*infra*, p. 28) provides that the contracting officer may "by a written order" make changes in the specifications, and that no change involving more than $500.00 shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Article 5 (*infra*, pp. 28–29) provides that no charge "for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order." Article 15 (*infra*, pp. 30–31) provides that all labor issues not satisfactorily adjusted by the contracting officer shall be submitted to a Board of Labor Review, and that "all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representa-

[3] These expenses were made up of the following items:

Salaries of supervisory and clerical forces and expenses at Roanoke for 3½ months	$11,344.40
Overhead expenses at Montgomery office for 3½ months	18,093.52
Liability and compensation insurance	4,661.07
Heating cost	4,124.73
Field expenses, resulting from delay in furnishing Boiler House information	290.89
Cost of grading, roads, and walks	12,734.91
Total	51,249.52

tive, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions."

1. *Claim resulting from the use of outside scaffolds (F. 15).*—Respondent had planned to construct the brickwork without the use of outside scaffolds (p. 23). When respondent commenced the brickwork, petitioner's supervising superintendent of construction and his assistant orally directed respondent to build outside scaffolds, thus requiring the brickmasons to work from the outside of the building (p. 24). Respondent asked for a written order therefor and was refused, the supervising superintendent replying that while he could not order respondent to construct such outside scaffolds, he could and would make respondent sorry if he did not do so (p. 24). Respondent continued to lay the bricks from the inside and the supervising superintendent of construction required that all bricks be laid uniformly on opposite sides of the building within 1/16 of an inch (p. 24). He also required that the mortar joints throughout the building not vary by more than 1/8 of an inch (pp. 24–25). Brickwork not meeting these exact requirements was rejected (p. 25). The court below found these exactions and requirements to be unauthorized, arbitrary, capricious and so grossly erroneous as to imply

bad faith (p. 25). Respondent, believing himself to be confronted with a situation which it was impossible to meet and overcome, proceeded to construct the outside scaffolds and to perform all brickwork from such scaffolds (p. 25). All of the brickwork could have been performed better, more nearly in accordance with the specifications and at much less expense by the customary and accepted overhand or inside method which respondent had planned to use (p. 25). After the construction of the outside scaffolds, precise requirements as to exact accuracy were no longer imposed (p. 25). Respondent's costs were increased $25,886.84 as a result of the requirement that he use outside scaffolds (p. 25). There is no finding that any written authorization for the use of such outside scaffolding was ever obtained either from the contracting officer or the head of the department as required by Articles 3 and 5 of the contract, or that any appeal was taken to the head of the Department.

2. *Claim for extra expenses due to arbitrary and unauthorized rulings* (*F. 16*).—(a) The court below found that because petitioner's officers at the site of the work were unreasonably meticulous and overexacting in their inspection, it was necessary for the respondent to hire two additional men for the job to handle protests and appeals and to deal directly with the contracting officer in Washington. The need for the services of these additional

men would not have arisen except for the unreasonable, unauthorized, and arbitrary acts of petitioner's officers at the site of the work (p. 28). The cost of the salary and expenses of these men was $4,952.95 (p. 28). Plaintiff protested orally to the supervising superintendent of construction and to the contracting officer with respect to these claims (p. 27), but there is no finding that an appeal was ever taken from the contracting officer's decisions to the head of the department.

(b) The court below found that petitioner's inspection officers unreasonably and arbitrarily required respondent to do work and use materials not required by the contract (pp. 28–30), for which the excess cost totalled $4,080.26.[4] There is no finding that these requirements of changes and extras were made in writing by the head of the department or the contracting officer as required by Articles 3 and 5 of the contract, and although there may have been oral protests to the contracting officer (p. 27),[5] there is no finding

[4] This claim is composed of the following items: (1) $2,620.66, for erroneously requiring the bolting of metal pans used for laying concrete floors (pp. 28–29); (2) $1,352.10, for requiring fine grading in certain basements before the mechanical contractor had laid his pipes, respondent being required to regrade these basements at an excess cost after the pipes were laid (pp. 29–30); (3) $107.50, for temperature steel erroneously required to be used in certain two-way reinforced concrete slabs (p. 30).

[5] The finding as to oral protests to the contracting officer appears in connection with the claim for $4,952.95 for salaries and expenses of the two extra representatives engaged to

that any appeal was ever taken from his decision to the head of the department.

3. *Extra wages paid to reinforcing rodmen* (*F. 17*).—The contract, which was financed from Public Works Administration funds, provided in Article 18 thereof that skilled labor should be paid not less than $1.10 an hour and unskilled labor not less than 45 cents an hour (p. 31). Before entering into the contract, respondent wrote to the Federal Emergency Administration of Public Works (PWA), pointing out that no rate of pay was fixed in the contract for semiskilled labor (pp. 32–33), and by letter of September 11, 1933, respondent was advised that it was anticipated that certain semiskilled workers would be employed at a rate less than that for skilled workers (p. 33). Pursuant to a suggestion made by the Deputy Administrator of PWA to members of State Public Works Advisory Boards that a complete rate of compensation for labor be agreed upon (pp. 34–35), the Virginia State labor conference on October 27, 1933, promulgated a schedule setting forth certain hourly wage rates, included among which were carpenters on rough work at the rate of 80 cents per hour and apprentices, helpers or certain unskilled laborers at 60 cents per hour (p. 35). Prior to and during the performance of

handle protests (p. 27); but is worded somewhat ambiguously and may have been intended to refer to all claims involved in suit. For purposes of this petition, it may be so treated.

the contract, the work of placing and tying reinforced rods was classed as semiskilled work in the construction industry generally and on certain other PWA contracts (p. 36). On March 9, 1935, after the completion of respondent's contract, reinforcing steel work was classified by the PWA as semiskilled, calling for an hourly wage rate of 60 cents (pp. 35–36).

Respondent had planned to use semiskilled labor at a rate of 60 cents per hour for placing the reinforced steel rods (p. 36). On March 15, 1934, petitioner's superintendent of construction wrote to the Department of Labor, stating that the contract provided for only two scales of wages, namely, skilled and unskilled labor, and asking whether concrete reinforcing steel rodmen were considered skilled workmen (p. 38). The court below found that this letter failed to state the true controversy (p. 39). On March 20, 1934, the Department of Labor replied to the superintendent of construction that the Public Works Administration had classified steel rodmen as skilled workmen (p. 40). The superintendent of construction thereupon required respondent to pay all rodmen the skilled rate of $1.10 per hour, including back pay to the men who had theretofore been paid 60 cents (p. 43), at a total additional cost to respondent of $4,365.12. Respondent protested against this requirement to the contracting officer, who approved the determi-

nation of the supervising superintendent but made no written ruling or independent decision on the question (p. 40). The court found that this act of the contracting officer was unwarranted, arbitrary and so grossly erroneous as to imply bad faith (p. 40), but there is no finding that respondent ever appealed from the contracting officer's decision.

(b) The court also found that petitioner's inspector "arbitrarily, capriciously, unreasonably and grossly erroneously interfered with and delayed the men engaged on reinforcing steel work and caused an unreasonable amount of idle time of steel crews on the job" (p. 45). The excess cost and damages resulting from this conduct were placed at $4,291.93 (p. 45). Here again there is no finding that any appeals were taken from the acts of the petitioner's inspector.

4. *Claim for excess wages paid to semiskilled carpenters* (*F. 18*).—For the same reasons as existed with respect to the steel rodmen, petitioner's superindent of construction required respondent to pay $1.10 per hour for all carpenter work, including rough carpentry used for the construction of concrete forms and scaffolding. The court found likewise that this ruling was "unauthorized, arbitrary and so grossly erroneous as to imply bad faith" (p. 46). The excess cost for carpenters' wages was found to be $26,354.19 (pp. 46–47). Although there was a protest to the contracting

officer, the court found that he came to no independent decision, and there was no appeal to the head of the Department.

5. *Claim to the use of Roanoke Marble & Grante Company* (F. 19).—The Roanoke Marble & Granite Company was a subcontractor of respondent who had undertaken to furnish all the materials and labor necessary to install and complete the tile, terrazzo, marble and soapstone work called for in the contract. Petitioner's superintendent of construction and the contracting officer required that all mechanics be paid a skilled labor rate and would not allow a lesser rate of pay for semiskilled labor (p. 49), although the custom of the trade permitted the use of an improver or a semiskilled assistant to each skilled mechanic (p. 48). No finding was made as to any appeal to the head of the department from this requirement. As a result of this ruling, the subcontractor was required to expend the sum of $9,730.27 in excess of what the reasonable cost would have been had the subcontractor been permitted to use semiskilled labor. Respondent paid his subcontractor the total consideration specified in the subcontract, but neither respondent nor the subcontractor has been paid by petitioner for any part of the excess costs of labor (p. 55).[6]

[6] The final item of claim of $15,180.52, arising out of the requirement that respondent use local sandstone, was found by the court below to be without merit, and the facts relating thereto are accordingly here immaterial.

The Court of Claims entered its findings of fact and opinion on October 5, 1942, awarding judgment to respondent in the sum of $130,911.08. Judge Madden dissented as to the disposition of all items other than the claim of $51,249.52 caused by Redmon's delay on the ground that there had been no appeal to the head of the department, as required by Article 15. After the decision of this Court in *United States* v. *Rice*, 317 U. S. 61, on November 9, 1942, the United States moved for a new trial, specifically calling the attention of the court below to the controlling effect of the *Rice* decision on the question of liability for delay. The motion for a new trial was overruled, on March 1, 1943, without opinion or any reference whatsoever to the *Rice* decision.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

(1) In holding that under respondent's contract, the United States was obligated to compel the mechanical contractor to complete his work in less than the 420 days allotted to him in his contract in order to enable respondent to complete his contract ahead of the completion date fixed therein.

(2) In including general office overhead in the computation of damages for delay in the absence of any finding that such overhead resulted solely from such delay.

(3) In holding that respondent could recover for extra work or material in the absence of a written order therefor as required by the contract.

(4) In holding that respondent could recover for the cost of extra work or materials resulting from the acts or orders of the Government supervising inspector where no appeal therefrom was taken to the contracting officer.

(5) In holding that respondent could recover for the cost of such extra work or material where no written appeal was taken from the ruling of the contracting officer to the head of the department.

(6) In holding, in the absence of substantial evidence, that the rulings and decisions of the supervising inspector and his assistant were so unreasonable, arbitrary and capricious as to imply bad faith.

(7) In holding that respondent was not required by the terms of the contract to afford the head of the department an opportunity to correct erroneous rulings made by inferior officers if such rulings were so arbitrary and capricious as to imply bad faith.

(8) In awarding judgment to respondent on the claim of a subcontractor in the absence of any finding that respondent had reimbursed the subcontractor or was under a legal obligation so to do.

(9) In failing to follow the decisions of the Supreme Court of the United States in *United States* v. *Rice*, 317 U. S. 61; *Crook Co.* v. *United States*, 270 U. S. 4; and *United States* v. *Callahan Walker Co.*, 317 U. S. 56.

(10) In entering judgment for respondent.

REASONS FOR GRANTING WRIT

This case is a striking example of recently recurring departures by the Court of Claims from what appear to be the clearly controlling precedents of this Court's decisions. Insofar as the damages granted for delay are concerned, the case is one of several[7] in which the Court of Claims has refused to follow the decisions of this Court in *United States* v. *Rice*, 317 U. S. 61, and *Crook Co.* v. *United States*, 270 U. S. 4. Insofar as the court held inapplicable the provision in the contract that changes and extra work be ordered in writing by the contracting officer or head of the department, the judgment below is in conflict with *Plumley* v. *United States*, 226 U. S. 545, 547–548, which two members of the Court of Claims have declared no longer to be authoritative. *Armstrong and Co.* v. *United States*, C. Cls. No. 44583, decided March 1, 1943.[8] Insofar as the court

[7] See *Diamond* v. *United States*, No. 45419, decided March 1, 1943; *Rogers* v. *United States*, No. 44581, decided April 5, 1943; *Langevin* v. *United States*, No. 43903, decided May 3, 1943.

[8] In the *Armstrong* case four of the five judges of the court below recognized that to allow recovery for extra work not ordered in writing is "contrary" to the decision of this Court in the *Plumley* case. However, Judges Madden and Littleton expressly disapproved of and refused to follow the *Plumley* case. Judge Jones concurred on another ground. The Chief Justice and Judge Whitaker dissented on the authority of the *Plumley* case. Cf. *Langevin* v. *United States*, No. 43903, decided May 3, 1943, in which the *Plumley* case was followed on another point.

below holds it unnecessary for a claimant to avail himself of the contractual provision for appeal from the contracting officer's decision to the head of the department, its judgment is in direct conflict with *United States* v. *John McShain, Inc.*, 308 U. S. 512, 520, and *United States* v. *Callahan Walker Co.*, 317 U. S. 56.

Since each of these points involves the construction of standard provisions in Government contracts,[9] which are applicable to a great number of construction projects involving hundreds of millions of dollars, the questions presented are sufficiently important to warrant determination by this Court.

1. The Court of Claims held that the United States was liable in damages to the respondent for preventing completion of his contract 106 days ahead of the completion date fixed in the contract. That holding is squarely opposed to the decisions of this Court in *United States* v. *Rice*, 317 U. S. 61,[10] and *Crook Co.* v. *United*

[9] The form of Government contract here involved was "U. S. Government Form P. W. A. 51," the critical provisions of which are substantially the same as those in the standard form of Government construction contract. Articles 3, 5, 9, 13, and 15 of the contract, the critical provisions in this case, are substantially the same as the similarly numbered provisions in the standard form of Government contract except that the finality of the administrative findings and decisions, under Article 15, is not limited in the P. W. A. form to questions of fact.

[10] The *Rice* case was expressly called to the attention of the court below on the motion for a new trial.

States, 270 U. S. 4. In the *Rice* case, which involved substantially identical contractual provisions, the Court of Claims had awarded damages to a mechanical contractor for delay in completion of the work beyond the stipulated contract time, where the delay was due to unexpected soil conditions requiring a relocation of the site of the building to be constructed by another Government contractor. 95 C. Cls. 84. This Court, reversing the Court of Claims and reaffirming the *Crook Co.* case, held specifically that the United States, under a standard form construction contract, did not "bind itself to a fixed time for the work to come to an end" or "to have the property ready for work by a contractor at a particular time"; that "for delay the Government was required to do no more than grant an extension of time" to the contractor; and that delay to plaintiff caused by a change made by the Government in the specifications of an independent contractor on the same job does not give rise to liability on the part of the Government since the plaintiff was required by the standard form contract "to adjust its work to that of the [other] contractor, so that delay by [him] would necessarily delay [plaintiff's] work" (317 U. S., at 64–65).

The *Rice* decision applies *a fortiori* to the situation presented in the case at bar. In the *Rice* case the delay prevented the claimant from fin-

ishing its work until long after the date specified in the contract. Here respondent's grievance is that the United States did not cancel the Redmon contract in time to permit respondent to complete the performance of its contract 106 days before the required date." Obviously, if the Government was under any obligation under the contract to compensate respondent for delays—an obligation which the *Rice* case expressly held not to exist—that obligation was limited to delays beyond the date for completion of performance specified in the contract.

The court's conclusion that the Government was at fault in not terminating Redmon's right to proceed sooner than it did, thereby delaying the advanced completion of respondent's contract, in effect is based on the false assumption that the Government had the right to require Redmon to complete his work ahead of time. Under the terms of the mechanical contract, Redmon had the

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" At the time respondent entered into his contract on December 2, 1933, neither the mechanical contractor nor the United States was advised that he planned to complete his work 106 days ahead of the stipulated time made available to him by the contract. The mechanical contractor was not advised of this expectation until January 27, 1934, and the Government was not advised thereof until March 30, 1934. In the meantime, Redman had executed his contract and his surety had become bound (F. 9, p. 10). Neither could be deemed obligated by a plan which respondent had kept to himself up to that point, nor bound so to order the progress of the mechanical contract as to facilitate or render possible respondent's desired performance in advance of his obligated time.

legal right so to schedule his work as to complete his contract within 420 days, and full performance within that period would constitute full compliance with the contract. After Redmon's contract was terminated by the Government for lack of satisfactory progress, his surety undertook the completion of the mechanical work, and performed it (through a subsequent contractor) within the contract time, thereby fully discharging Redmon's obligation. Indeed, for the Government to have terminated Redmon's contract for failure to proceed at a rate which would assure completion in advance of the stipulated time for performance might have jeopardized the Government's right of recourse against the surety.[12]

2. The extra work and labor for which the court below awarded respondent substantial damages were plainly not authorized in the manner provided in the contract. Article 3 of respondent's contract provides, as does the standard form of Government contract, that all change orders shall

[12] There is no basis, on the very findings of fact made below, for any conclusion that the Government acted improperly in not earlier terminating Redmon's right to proceed. Unquestionably, the United States had no right to terminate Redmon's right to proceed until it became apparent that his work would not be completed within the contract time. The fact that the work under Redmon's contract was so completed by Redmon's surety after the United States declared Redmon in default and terminated his right to continue, establishes conclusively that the Government's conduct was timely and that earlier termination might have been premature.

be issued in writing by the contracting officer and, if the amount thereof exceeds $500, shall also be approved by the head of the department. Article 5 provides that all extras shall be ordered in writing by the contracting officer, and that the price to be paid therefor shall be set forth in such order. Certain items of respondent's claim—such as the use of outside scaffolding for the brick work, the bolting of the metal pans, the fine-grading of basements, and the use of temperature steel—were held by the court below to be extra work and labor required of the contractor by the Government officials at the site of the work. The court failed to make any findings that any written change orders were ever issued by the contracting officer or approved by the head of the department, or that any written order for extras was ever issued by the contracting officer setting forth the price to be paid therefor; and the opinion below conclusively discloses the contrary (p. 65). The allowance to respondent of the cost of such extra work and labor, in the absence of the order therefor "by the officer and in the manner required by the contract," is directly contrary to the decision of this Court in *Plumley* v. *United States*, 226 U. S. 545, 547, 548.

3. The court below found that the respondent had incurred excess costs for labor and materials and additional damages for delay as a result of acts and instructions of the Government's supervising superintendent of construction and his as-

sistant which were unauthorized by the contract and which were so arbitrary and capricious as to imply bad faith. But Article 15 of the contract provided that all disputes on questions arising under the contract should be decided by the contracting officer, subject to appeal to the head of the department whose decision should be final (p. 65). A number of the rulings and directions of the officials at the site of the work were appealed by respondent to the contracting officer, although this was not found to have been done in all cases.[13] But even if all disputes were presented to the contracting officer, there is no finding

[13] The findings themselves demonstrate that there is no merit to the suggestion made by the court below in its opinion (p. 69) that the arbitrary, capricious, and unreasonable conduct of the officers at the site of the work precluded respondent from taking appropriate appeals. The findings disclose that two men were employed exclusively in carrying appeals to Washington to the contracting officer (pp. 28-29), that the contractor consistently protested to the contracting officer against the delay (p. 15), that the contractor protested to the contracting officer about the use of temperature steel and succeeded in having the ruling of the inspector overruled (p. 30), that the contractor appealed to the contracting officer in respect of the use of a central concrete mixing plant for a smaller concrete plant and succeeded in having the inspector overruled (p. 55), and that the contractor consistently protested about the hourly wage rates to be paid for concrete rodmen, rough carpenters, terrazzo grinders, and other allegedly semiskilled workmen (pp. 38, 40, 46, 52). There is thus no basis for the court's conclusion that the respondent was prevented from appealing to the contracting officer, and it has not been suggested that that official in any way impeded the taking of appeals from his rulings to the head of the department.

that any appeals were taken therefrom to the head of the department as provided by Article 15 of contract."[14] In this aspect, the decision below is in direct conflict with the ruling of this Court in *United States* v. *John McShain, Inc.*, 308 U. S. 512, 520, and *United States* v. *Callahan Walker Co.*, 317 U. S. 56. If the questions in dispute were erroneously decided by the contracting officer, "Article 15 of the contract provided the only avenue for relief." *United States* v. *Callahan Walker Co.*, at p. 61. Judge Madden observed in his dissenting opinion in this case (pp. 85–86):

> the Government has the right to contract, if the contractor is willing, that the Government shall not be subject to damage suits for disagreements between its inferior agents and the contractor, without giving the Head of the Department an opportunity to right the alleged wrong before it has grown into a big claim against the public funds. And the fact that the inferior agent on the job does not act in good faith does not make it less necessary that his superiors, who presumably would deal fairly with the contractor, should have an opportunity to pass upon the dispute. * * *

[14] The court below held that the necessity of appealing a dispute was excused by reason of the arbitrary and capricious nature of the conduct of the officers at the site, which of itself constituted a breach of the contract. It seems too clear to require argument that exhaustion of remedies is excused only where the person to whom the appeal should be taken has prejudged the dispute and not where the act or decision appealed from is arbitrary. *Cf. Fitzgibbon* v. *United States*, 52 C. Cls. 164, 169; *United States* v. *Smith*, 256 U. S. 11, 16.

Here the Government was not afforded the opportunity to correct allegedly erroneous rulings [15] in the manner for which it had expressly contracted, and in a situation in which the appellate review by the head of the department was peculiarly essential.

CONCLUSION

For the foregoing reasons, we respectfully submit that this petition for a writ of certiorari should be granted. We further suggest that the decision of the court below may be so plainly erroneous as to warrant a reversal without argument.

CHARLES FAHY,
Solicitor General.

MAY 1943.

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[15] Should a writ of certiorari be granted, petitioner is prepared to show upon a review of the record that in a number of instances the rulings of the inspectors at the site of the work, and the affirmance thereof by the contracting officer, were entirely proper.

APPENDIX

The pertinent provisions of U. S. Government Form No. P. W. A. 51 ("United States Government Form of Contract") are as follows:

ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than $500 shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

ARTICLE 5. *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the

contracting officer and the price stated in such order.

ARTICLE 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government, may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided,* That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to un-

foreseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: *Provided further,* That the contractor shall within 10 days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

ARTICLE 13. *Other contracts.*—The Government may award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

ARTICLE 15. *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all

other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.

ARTICLE 18. *Wages.*—(a) All employees directly employed on this work shall be paid just and reasonable wages, which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort. The contractor and all subcontractors shall pay not less than the minimum hourly wage rates for skilled and unskilled labor as follows:

Skilled labor, $1.10; Unskilled labor, $0.45.

(b) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work shall be posted in a prominent and easily accessible place at the site of the work, and the contractor shall keep a true and accurate record of the hours worked by and the wages paid to each employee and shall furnish the contracting officer with a sworn statement thereof on demand. All employees shall be paid in full not less often than once each week and in lawful money of the United States in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased,

rent, or other obligations, but such obligations shall be subject to collection only by legal process.

(c) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers on April 30, 1933, shall be above the minimum rates specified above, such agreed wage rates shall apply: *Provided,* That such agreed wage rates shall be effective for the period of this contract, but not to exceed 12 months from the date of the contract.

(d) The above designated minimum rates are not to be used in discriminating against assistants, helpers, apprentices, and serving laborers who work and serve skilled journeymen mechanics, and who are not to be termed as "unskilled laborers."

(e) The minimum wage rates herein established shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review. In event that the Federal Emergency Administration of Public Works acting on such recommendation establishes different minimum wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the contractor, whether under this contract or any subcontract.

(f) The Board of Labor Review shall hear all labor issues arising under the operation of this contract and as may result from fundamental changes in economic conditions during the life of this contract. Decisions of the Board of Labor Review shall be binding upon all parties.

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